STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE NO. 34-80:

CIRCLE TEACHERS ASSOCIATION,

Complainant,

- vs -

McCONE COUNTY SCHOOL DISTRICT NO. 1,

Defendant.

FINAL ORDER

* *

No exceptions having been filed, pursuant to ARM 24.26.215, to the Findings of Fact, Conclusions of Law and Recommended Order issued on April 20, 1981;

THEREFORE, this Board adopts that Recommended Order in this matter as its FINAL ORDER.

DATED this 15th day of May, 1981.

BOARD OF PERSONNEL APPEALS

By: John Kelly Addy
John Kelly Addy
Chairman

* *

CERTIFICATE OF MAILING

The undersigned does certify that a true and correct copy of this document was mailed to the following on the 21 day of May, 1981:

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STATE OF MONTANA
BEFORE THE BOARD OF PERSONNEL APPEALS

IN THE MATTER OF UNFAIR LABOR PRACTICE CHARGE NO. 34-80:

CIRCLE TEACHERS ASSOCIATION, Complainant, vs. McCone County School District Number 1, Defendant.	FINDINGS OF FACT; CONCLUSIONS OF LAW; AND RECOMMENDED ORDER

* * * * * * * * * * * * * * * *

On August 15, 1980, the Complainant, in the above captioned matter, filed an unfair labor practice complaint with this Board charging the Defendant of violating Section 34-31-401(5) MCA. More specifically, the Complainant alleged that the Defendant did not bargain in good faith in that the Defendant entered into individual contracts with three teachers which did not conform to the negotiated agreement.

The Defendant, on August 29, 1980, filed an ANSWER to the complaint with this Board denying violation of Section 39-31-401(5) MCA.

On November 21, 1980, this Board issued a NOTICE OF HEARING which set a formal hearing in this matter for December 10, 1980. The parties to this matter agreed to vacate the scheduled formal hearing date to provide an opportunity to agree upon the facts in this matter and dispose of the necessity of a formal hearing.

By STIPULATION signed on December 31, 1980, the parties agreed upon the facts in this matter, set forth their contentions, identified remedies and set a briefing schedule. The last brief in this matter was received on February 13, 1981.

Complainant, Circle Teachers Association, was represented by Emilie Loring, Attorney, Great Falls, Montana.

Defendant, McCone County School District Number 1, was represented by Chadwick H. Smith, Attorney, Helena, Montana.

COMPLAINANT'S CONTENTIONS

1. As the series of collective bargaining agreements all provide for an individual teacher to waive educational credits and/or experience by affidavit and no affidavits were requested of nor signed by the three teachers, the experience levels set forth in the salary schedules must apply.

2. Individual bargaining which results in lowering salary schedules for individual teachers is an unfair labor practice, constituting failure to bargain in good faith with the recognized exclusive representative of Defendant's faculty in violation of Section 39-31-401(5), M.C.A.

3. Complainant is not required to utilize the grievance procedure in an attempt to remedy an unfair labor practice.

4. The Board of Personnel Appeals has jurisdiction to decide an allegation of failure to bargain in good faith.

DEFENDANT'S CONTENTIONS

1. The named teachers received experience credit based upon the information received from each of them at the time of each teacher's first contract and they are now estopped from attempting to vary the individual written contracts based upon such information.

2. The named teachers are bound by the individual teacher contracts they entered into for each of the years in question. By signing the individual contracts, the teachers waived any additional right which may have been available to them by reason of earlier collective bargaining. Each

teacher knew the school policy on experience credit outside of the system and accepted it by signing the individual contracts offered.

3. Affidavits are not required for waiver of rights under the master collective bargaining agreement. The collective bargaining agreement does not require affidavits but provides that affidavits "may" be given. The law of contracts provides that the last writing between the parties is controlling on any subject therein contained and the named teachers did in fact waive any rights to salary greater than stated in the individual contracts.

4. A waiver of a contractual right by a subsequent written contract has no relationship to collective bargaining. The individual teachers may enforce the collective bargaining agreement if they desire or may waive any provision thereof individually if they desire. Such decision by the teacher and the school district is not an unfair labor practice and the waiver by subsequent contract is legal.

5. The named teachers did not proceed to determine the alleged grievance under the contracted grievance procedure before proceeding with other quasi-judicial remedies and therefore this untimely administrative proceeding must be dismissed.

6. That each named teacher received the salary as contracted and is not entitled to any further payment for services or otherwise.

7. That the Board of Personnel Appeals lacks jurisdiction over the subject matter stated in the charge filed herein.

8. That the charge fails to state facts sufficient to constitute a valid claim against the defendant upon which any relief can be granted.

9. That the Defendant has not violated Section 39-31-401(1) and (5), M.C.A. of the Public Employees Collective Bargaining Act, or any other section thereof.

10. That the Defendant has, at all times in the course of collective bargaining with the Complainant, bargained in good faith in accordance with Section 39-31-305, M.C.A., and has not interferred with, restrained or coerced its employees in the exercise of rights guaranteed by Section 39-31-201, M.C.A.

REMEDY SOUGHT BY COMPLAINANT

Complainant seeks an order of the Board of Personnel Appeals directing Defendant School District:

1. To make Dancer, Langton and McGarvey whole by paying them the difference between their proper salary level and the salaries actually paid between February 15, 1980 and August 15, 1980 (for the six months prior to the filing of the charge);

2. To place Daisy Langton on the eight-year experience level of the negotiated salary schedule, effective with the beginning of the 1980-81 school year;

3. When Betty McGarvey returns from maternity leave, to place her on the experience level consistent with fourteen years of experience, BA + 1, of the negotiated salary schedule, effective upon her return from maternity leave.

AGREED FACTS

1. McCone County School District No. 1, Defendant, is a body corporate School District with administrative offices in Circle, Montana. It is a political subdivision of the State of Montana, created and existing under the Constitution and laws of that state. The District operates the public elementary and high schools in Circle, Montana.

2. Circle Teachers' Association, affiliated with the Montana Education Association, is the recognized exclusive bargaining representative for the faculty employed in the Circle schools.

3. In 1964 the Circle Education Association affiliated with the Montana Education Association and remained affiliated through 1972. Sometime thereafter the Circle Teachers' Association, an independent organization, was formed and recognized by Defendant School District. Exhibits A, B, and C were contracts with the independent organization. In September 1978 the Circle Teachers' Association affiliated with the Montana Education Association. Exhibits D, E and F were with the MEA affiliate.

4. There have been a series of collective bargaining agreements between the parties attached hereto, as follows:

Exhibit A, 1975-1976 Agreement, executed March 3, 1975

Exhibit B, 1976-1977 Agreement, executed March 12, 1976

Exhibit C, 1977-1978 Agreement, executed May 9, 1977

Exhibit D, 1978-1979 Agreement, executed Sept. 12, 1978

Exhibit E, 1979-1980 Agreement, executed Nov. 14, 1979

Exhibit F, 1980-1981 Agreement, executed May 22, 1980

Each of the Agreements contained the following language:

> "Educational credits and/or Experience: A teacher may sign an affidavit to waive educational credits and/or experience to enable them to be placed on the salary schedule at a level mutually agreed upon. Any future raises for this person based on either vertical (experience) or horizontal (educational) advancement will be computed from the agreed base and only education and experience gained after the date of this waiver will be used for advancement on this or future salary schedules."

5. Daisy Langton was employed as a teacher by the Defendant School District in November, 1975. At that time she had two years and eight months teaching experience in

other schools. She was given credit for one year previous experience and placed at the first year level of the salary schedule. She had a BA degree and has not earned sufficient additional educational credits to move to the BA + 1 salary column. Langton never signed an Affidavit waiving correct placement.

Langton was placed upon the negotiated salary schedule showing one year prior experience when she was hired for the 1975-1976 school year in that she reported only one year of prior teaching experience. Later she contended she had two years' prior experience and was moved up another year. Langton entered into an individual written contract with the school district for each school year, after the annual collective bargaining agreement was signed, and accepted the salary offered as taken from the negotiated salary schedule without objection. No grievance procedure was followed as provided in the collective bargaining agreement prior to proceeding before the Board of Personnel Appeals.

Langton alleges placement and salary discrepancies as follows:

Year	Level Placed and Salary Paid		Level Association Contends Teacher Should Have Been Placed and Salary Association Contends Should Have Been Paid	
1975-76	1	(130 days) $ 6,236	3	$ 8,970
1976-77	3	9,480	4	9,770
1977-78	4	10,560	5	10,880
1978-79	5	11,349	6	11,678
1979-80	6	12,340	7	12,720
1980-81	7	14,100	8	14,520

6. Betty McGarvey was employed as a teacher by the Defendant School District in August, 1975. At that time she had had nine (9) years teaching experience, two of them in the Circle school system and the balance in other schools. She was given credit for five (5) years of experience and

placed at the five-year experience step of the salary schedule. McGarvey had a BA degree in 1975 and was placed in the BA + 1 salary column in the 1977-78, 1978-79, 1979-80 and 1980-81 academic years. McGarvey never signed an affidavit waiving correct placement.

McGarvey was informed when entering the Circle school system that school policy provided that "Five (5) years' maximum experience to be credited to teacher entering system from other schools for salary schedule position". The policy is applied by considering each entry from another school as a starting entry. McGarvey was offered a first year contract allowing five (5) years' prior teaching experience on the negotiated salary schedule. McGarvey accepted the contract and the policy, and entered into an individual contract with the school district for each school year, after the annual collective bargaining agreement was signed, and accepted the salary offered as taken from the negotiated salary schedule without objection.

McGarvey alleges placement and salary discrepancies as follows:

Year	Level Placed and Salary Paid			Level Association Contends Teacher Should Have Been Placed and Salary Association Contends Should Have Been Paid		
1975-76	5	BA	$ 9,750	9	BA	$10,686
1976-77	6	BA	10,770	10	BA	11,520
1977-78	7	BA + 1	11,990	10 (top)	BA + 1	13,020
1978-79	8	BA + 1	12,862	11 (top step)	BA + 1	13,938
1979-80	9	BA + 1	14,150	11 (top step)	BA + 1	14,980
1980-81	(----------on maternity leave----------)					

7. Allan Dancer was employed as a teacher by the Defendant School District in August, 1978. At that time he had seven (7) years teaching experience in other schools. He was given credit for five (5) years of experience and placed at the fifth year level of the salary schedule. He

never signed an affidavit waiving correct placement. He is no longer employed by the District.

Dancer was informed when entering the Circle school system that school policy provided that "Five (5) years' maximum experience to be credited to teacher entering system from other schools for salary schedule position." The policy is applied by considering each entry from another school as a starting entry. Dancer was offered a first year contract allowing five (5) years' prior teaching experience on the negotiated salary schedule. Dancer accepted the contract and the policy, and entered into an individual contract with the school district for each school year, after the annual collective bargaining agreement was signed, and accepted the salary offered as taken from the negotiated salary schedule without objection.

Dancer alleges placement and salary discrepancies as follows:

Year	Level Placed and Salary Paid		Level Association Contends Teacher Should Have Been Placed and Salary Association Contends Should Have Been Paid	
1978-79	5	$11,949	7	$12,006
1979-80	6	12,340	8	13,090

8. Individual contracts were signed between Defendant and the three teachers for each academic year involved. See Exhibits G through S. These contracts contain the salaries as set forth for each teacher in the "Level Placed and Salary Paid" columns in statements of fact 5, 6 and 7.

DISCUSSION

There has been a series of collective bargaining agreements between the Circle Teacher's Association (hereinafter the Association) and McCone County School District No. 1 (hereinafter the District):

Exhibit A, 1975-1976 Agreement, executed March 3, 1975
Exhibit B, 1976-1977 Agreement, executed March 12, 1976
Exhibit C, 1977-1978 Agreement, executed May 9, 1977
Exhibit D, 1978-1979 Agreement, executed Sept. 12, 1978
Exhibit E, 1979-1980 Agreement, executed Nov. 14, 1979
Exhibit F, 1980-1981 Agreement, executed May 22, 1980

Each of the collective bargaining agreements contained the following provision:

> Educational Credits and/or Experience: A teacher may sign an affidavit to waive educational credits and/or experience to enable them to be placed on the salary schedule at a level mutually agreed upon. Any future raises for this person based on either vertical (experience) or horizontal (educational) advancement will be computed from the agreed base and only education and experience gained after the date of this waiver will be used for advancement on this or future salary schedules.

At time of hiring, neither Daisy Langton (employed November, 1975), Betty McGarvey (employed August, 1975) nor Allan Dancer (employed August, 1978) signed such "affidavits" to waive educational and/or experience credits. Assuming that individual teachers could waive or modify the terms of a collective bargainig agreement by written affidavit, a proposition upon which I decline to rule, attempts to alter the terms of the existing collective bargaining agreement via this contractual method were not made. Thus, the question of a "clear and unmistakable" contract waiver is not in issue (see Tinken Roller Bearing Co.v. NLRB, 325 F.2d 746, 751, 54LRRM 2785 (6th Cir. 1963) cert. denied, 376 U.S. 971, 55 LRRM 2878 (1964)).

At time of hiring and ensuing years the District entered into individual contracts with Langton, McGarvey and Dancer (Exhibits G through S). Each individual contract with each of the affected teachers reflects a starting salary less than stated in the appropriate collective bargaining agreement considering the total actual experience credits of each affected teacher. The Association argues that it is an unfair labor practice for an employer to individually nego-

tiate initial placement on the salary schedule inconsistent with terms of the collective bargaining agreement. The District maintains that the teachers were contracted and paid in accordance with existing school policy and are now estopped from claiming more experience credit contrary to the terms of the individual employment contracts they signed, which contracts are the last writing on the subject.

It is well settled that an employer cannot ignore the recognized collective bargaining agent and negotiate individually with employees on matters inconsistent with the existing collective bargaining agreement. The U.S. Supreme Court held in J.I. Case Co. v. NLRB, 321 U.S. 332 (1944) 14 LRRM 501, that such individual bargaining was in violation of the Labor Management Relations Act (LMRA), Section 8(a)(5), analagous to Section 39-31-401(5) MCA. Citing the J.I. Case Co., supra case, this Board, in ULP #23-78, Fraser Education Association, MEA v. Valley County School District 2 and 2B found that an employer who bargained individually with employees violated Section 39-31-401(5) MCA. (See also Billings Board of Trustees v. Montana, 103 LRRM 2285 (Mont. Sup. Ct. 1979)). In this present matter, the District entered into individual contracts with three teachers which reflect a salary less than that stated in the collective bargaining agreement. The District argues, citing J.I. Case Co., supra., that individual bargaining is not in violation of the Collective Bargaining Act for Public Employees. Furthermore, the District contends that a collective bargaining agreement or master agreement does not supercede or proscribe an individual agreement. Although J.I. Case Co. supra indicates that individual contracts may be proper under certain strict circumstances, the Supreme Court concluded in J.I. Case Co. supra.:

> After the collective trade agreement is made, the individuals who shall benefit by it are identified by individual hirings. The employer, except as restricted by the collective agreement itself and except that he must engage in no unfair labor practice or discrimination, is free to select those he will employ or discharge. But the terms of the employment already have been traded out. There is little left to individual agreement except the act of hiring. This hiring may be by writing or by word of mouth or may be implied from conduct. In the sense of contracts of hiring, individual contracts between the employer and employee are not forbidden, but indeed are necessitated by the collective bargaining procedure.
>
> But, however engaged an employee becomes entitled by virtue of the Labor Relations Act somewhat as a third party beneficiary to all benefits of the collective trade agreement, even if on his own he would yield to less favorable terms. The individual hiring contract is subsidiary to the terms of the trade agreement and may not waive any of its benefits...
>
> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement.
>
> It is equally clear since the collective trade agreement is to serve the purpose contemplated by the Act, the individual contract cannot be effective as a waiver of any benefit to which the employee otherwise would be entitled under the trade agreement. The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group. Its benefits and advantages are open to every employee of the represented unit, whatever the type or terms of his pre-existing contract of employment.

In the matter before the Board, the District entered into individual contracts with the three teachers which addressed items other than just the "act of hiring". In addition, the salary amounts contained in the individual contracts are less than stated in the master agreement considering educational and experience credits. The three teachers did not sign an affidavit to waive educational

and/or experience credits as provided for by the master agreement. The individual contracts cannot act as a waiver to a reduced salary level. It is clear that the District bargained individually with employees in violation of Section 39-31-401(5) MCA.

The District argues that this Board has no jurisdiction in this matter because none of the claims involve collective bargaining issues. The District further argues that there are no Montana statutes which authorize this Board to determine wage claims of public employees, including school teachers under contract. The Association is requesting back-pay for three teachers. However, the claim for back-pay was not a simple issue in and by itself. The Association charged the District with an unfair labor practice which allegedly resulted in a reduction in salary for three teachers. It is determined (see above) that, indeed, the District did commit an unfair labor practice by its action of bargaining individually with employees. This Board does have jurisdiction in matters of collective bargaining for public employees, including unfair labor practice charges. (See NLRB v. C & C Plywood Corp., 64 LRRM 2065 (U.S. Sup. Ct. 1967)).

No grievance relating to the alleged misplacement of the three teachers on the salary matrix was filed pursuant to the grievance procedure contained in the collective bargaining agreement (see Stipulated Facts). The District argues that the three teachers are required to exhaust the contractual remedy (grievance procedure) before going to any other forum for adjudication. Furthermore, the District maintains that this Board must honor the terms of a collective bargaining agreement entered into by the parties unless it violates a provision of the Public Employees Collective

Bargaining Act. The District's arguments miss the point because at issue in this matter is an unfair labor practice charge. This Board has the power and authority to adjudicate such charges (Section 39-31-403 MCA). The authority to remediate unfair labor practices "...shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement..." (C & S Industries, Inc., 158 NLRB No. 43, 62 LRRM 1043 (1966)). Should the District be implying that the matter of the unfair labor practice charge be deferred to the contract grievance procedure, they would be in error. The National Labor Relations Board addressed this question and adopted a prearbitral deferral policy in 1971, Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971). However, one of the key elements of the Collyer Doctrine is the existance of final and binding arbitration in the contractual grievance procedure, Wheeler Const. Co., 219 NRLB 104, 90 LRRM 1173 (1975). The grievance procedure contained in the collective bargaining agreement does not culminate in final and binding arbitration. Therefore, this matter cannot be deferred to the parties for settlement within the boundaries of the agreement, but is properly addressed before this Board.

The last issue to be addressed, as I find, is the matter of the five-year experience maximum credit policy adopted by the District. This policy, as explained in the Stipulated Facts, limits new teachers to five years of experience credit in determining placement within the negotiated salary matrix. The collective bargaining agreement sets forth no limitations as to placement of new teachers on to the salary matrix except for the signed affidavit waiver provision which was not implemented. The District contends that the teachers were placed upon the salary matrix accord-

ing to educational and experience credits declared in the individual contracts and in accordance with school policy. The individual contracts have already been found to be in violation of the Act. We must now address the school policy which limits new teachers to five years of experience.

First, I think, we must determine if the policy is a negotiable item or a sole prerogative of the District. The Kansas Supreme Court developed a balancing test to address such a question in N.E.A. v. Shawnee Mission Board of Education, 512 P2d 426, 84 LRRM 2223 (1973). The Kansas Court said:

> It does little good, we think, to speak of negotiablity in terms of "policy" versus something which is not "policy". Salaries are a matter of policy, and so are vacation and sick leaves. Yet we cannot doubt the authority of the Board to negotiate and bind itself on these questions. The key, as we see it, is how direct the impact of an issue is on the well being of the individual teacher, as opposed to its effect on the operation of the school system as a whole. [Emphasis added] The line may be hard to draw, but in the absence of more assistance from the legislature the courts must do the best they can. The similar phraseology of the N.L.R.A. has had a similar history of judicial definition. See Fibreboard Corporation v. Labor Board., 379 U.S. 203, 13 L.Ed. 2d 233, 85 S. Ct. 398, 57 LRRM 2609 and especially the concurring opinion of Stewart, J. at pp. 221-222.

The subjects of wages, hours and working conditions are the very root of collective bargaining. Placement on a salary matrix can only be considered a "wage" matter and would have the upmost of direct impact on an individual. Applying the Kansas Court balancing test can only prove that the District's five-year maximum experience policy is a mandatory subject of bargaining.

Secondly, we must consider the relationship of the District's policy, which is a mandatory subject of bargaining to the collective bargaining agreement. It is well settled labor law that the duty to bargain is an on-going process.

Unilateral changes in respect to wages, hours and other terms and conditions of employment by an employer during this process is a clear violation of the Act. (See NLRB v. Katz, 50 LRRM 2177 (U.S. Supreme Ct. 1962)). In this matter the District unilaterally established a policy which affected the salaries of employees represented by a collective bargaining representative.

CONCLUSIONS OF LAW

The Defendant, McCone County School District No. 1, did, by its action of negotiating individually with its employees, violated Section 39-31-401(5) MCA.

RECOMMENDED ORDER

It is hereby ordered that the Defendant, McCone County School District No. 1, shall:

1. Cease and desist from bargaining individually with employees represented by the Circle Teachers' Association;
2. Make Daisy Langton, Betty McCarvey and Allan Dancer whole by paying them the difference between their proper salary level and the salaries actually paid between February 15, 1980, and August 15, 1980;
3. Place Daisy Langton on the eight-year experience level of the negotiated salary schedule, effective with the beginning of the 1980-81 school year;
4. Place Betty McCarvey, when she returns from maternity leave, on the experience level consistent with fourteen years of experience, BA + 1, of the negotiated salary schedule, effective upon her return from maternity leave;

5. Post these FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER for not less than thirty (30) days in the usual posting location(s) in a conspicuous manner.

SPECIAL NOTE

Pursuant to Rule ARM 24.26.664, the above RECOMMENDED ORDER shall become the FINAL ORDER of this Board unless written exceptions are filed within 20 days after service of these FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER upon the parties.

DATED this 20th day of April, 1961.

BOARD OF PERSONNEL APPEALS

BY _____
Stan Gerke
Hearing Examiner

CERTIFICATE OF MAILING

I, Jennifer Jacobsen, do hereby certify and state that on the 20 day of April, 1981, I did mail a true and correct copy of the above FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDED ORDER to the following:

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